STATE OF MICHIGAN
SUPREME COURT

Court of Appeals No. 244507

Lower Court No. 2001-000103-CH
Michael E. Dodge, Judge

HOERSTMAN GENERAL CONTRACTING, INC.,	)	SUPREME COURT NO. 126958
Plaintiff/Appellee,	)	
v.	)	
JUANITA REMS HAHN and C. RONALD HAHN,	)	
Defendants/Appellants.	)	

PLAINTIFF-APPELLEE'S
BRIEF IN RESPONSE TO DEFENDANTS-APPELLANTS
BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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RESPONSE TO DEFENDANTS-APPELLANTS' STATEMENT OF BASIS OF JURISDICTION

Hoerstman agrees with Hahns' Statement of Basis of Jurisdiction since the Michigan Supreme Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2), MCR 7.302 and this Court's Order Granting Leave to Appeal dated May 12, 2005.

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. DID THE PARTIES ENTER INTO AN ACCORD AND SATISFACTION, WHEN HOERSTMAN GENERAL CONTRACTING, INC. CASHED A CHECK FROM THE HAHNS AFTER CROSSING OUT THE "FINAL PAYMENT" LANGUAGE ON THE CHECK?

Hoerstman General Contracting, Inc. says "No".

The Circuit Court says "No" and specifically found in favor of Hoerstman as to each of Hahns' affirmative defenses in its Judgment entered on September 30, 2002. (Trial Court's Judgment; A, 11a).

The Court of Appeals says "No". (Court of Appeals Opinion; A, 15a-16a).

COUNTER-STATEMENT OF FACTS

For purposes of brevity and clarity, the counter-statement of facts will utilize the same headings as used by the Hahns' in their Appellate Brief in conformity with MCR 7.212(C)(6). Where necessary, pursuant to MCR 7.212(D)(3)(b), inaccuracies and deficiencies in the Hahns' recitation of the facts will be pointed out to the Court with proper reference made to the record as required by this rule. To avoid unnecessary duplication of facts and in the interest of efficiency, a separate statement of facts pertaining to Hoerstman's Cross-Appeal will be omitted. The facts pertaining to this Cross-Appeal are adequately covered within the Hahns' statement of facts as supplemented pursuant to MCR 7.212(D)(3)(b) below. If the Court finds that a separate statement

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of facts is necessary, Hoerstman requests the opportunity to file a timely supplemental brief pursuant to MCR 7.212(I).

NATURE OF THE ACTION

Hoerstman agrees with the Hahns' recitation of the facts as contained under the heading entitled "Nature of the Action."

THE PLEADINGS AND PROCEEDINGS

Hoerstman hereby adopts the Hahns' statement of facts contained under the heading "The Pleadings and Proceedings" with two clarifications pursuant to MCR 7.212(D)(3)(b).

First, Hoerstman's Complaint sought foreclosure of a construction lien placed by Hoerstman on the Hahns' property to secure payment of $32,750.00 due and owing to Hoerstman by the Hahns for labor and materials provided in performance of certain construction work to the Hahns' home. (Plaintiffs' Complaint, pp. 3-5; A, 20a)[1]. Hoerstman sought foreclosure of its lien upon the Hahn property because the Hahns breached both the fixed fee contract and the promises they made pursuant to oral modifications of the contract. (Plaintiff's Complaint, ¶ 9; A, 20a).

Second, the Court of Appeals in its *Per Curium* Unpublished Opinion specifically found that no accord and satisfaction was reached by the parties as the tender made by the Hahns was not accompanied by a clear and explicit condition that, if payment was accepted by Hoerstman, such acceptance discharged Hoerstman's claim in full. (Court of Appeals Opinion, A, 15a).

SUBSTANCE OF PROOF

Hoerstman hereby adopts the Hahns' statement of facts contained under the heading "Substance of Proof" with several clarifications pursuant to MCR 7.212(D)(3)(b).

[1] References to "A, _____a" refer to Appellant's Appendix on Appeal, page ___a.

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First, in response to the Hahns' Appellate Brief, paragraph one (under the Substance of Proof heading), page three, it is true that at trial Mark Hoerstman testified that he was a licensed contractor in the State of Michigan. (Tr., Vol. I, p. 119; A, 96a)[2]. In closing argument, the Hahns for the first time argued that Hoerstman should be denied compensation because Hoerstman failed to prove that it was a licensed residential contractor as required by MCL 339.2412. (Tr., Vol. III, pp. 95-96; B, 36b-37b)[3]. On July 26, 2002, two days after the trial was completed, the Hahns submitted a Citation of Authority to the trial court citing two cases relied upon by the Hahns in its closing to support their argument. (Citation of Authority; B, 1b).

In response, Hoerstman filed a Response to Defendants' Citation of Authority. (Resp. to Defs' Citation of Authority; B, 3b). In that response, Hoerstman clarified that Hoerstman General Contracting holds the residential builder's license and that Mark Hoerstman is the qualifying officer who holds that license in the name of the Corporation. (Id.; B, 4b). Thus, the trial judge had this evidence as part of the record prior to the entry of judgment.

Second, referring to the Hahn Appellate Brief, second full paragraph, page 5, work was delayed not only because of the holidays and severe weather in January of 1999 (Tr., Vol I, p. 137; A, 104a), but also because during demolition of the interior of the home, Hoerstman discovered that the walls were brick. (Tr., Vol I, p. 138; A, 105a). Hoerstman was unable to determine that the walls were brick prior to demolition. (Tr., Vol I, p. 139; A, 106a). The removal of a brick wall rather than a frame wall, as contemplated, added expense to the job and took more time to remove.

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[2] References to "Tr, Vol __, p. ___" refer to the trial court transcript, volume number ___, page _____.

[3] Reference to "B, ____b" refer to Appellee's Appendix on Appeal, page _____b.

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(Tr., Vol I, pp. 139-140; A, 106a-107a). Although Hoerstman had no way of knowing prior to demolition that the walls were brick, Mr. Hahn knew the walls were brick all along and did not inform Hoerstman until after the brick wall was discovered during demolition. (Tr., Vol I, p. 140; A, 107a).

Third, in response to the Hahn Appellate Brief, second paragraph, page 6 and first paragraph, page 8, Mr. C. Ronald Hahn agreed to pay the extra charge to have the concrete floor removed. (Tr. Vol. III, p. 17; A, 169a). Mark Hoerstman requested that Mr. Hahn sign a written change order for the work. (Tr. Vol. I, p. 144; B, 11 b). In response to Mark Hoerstman's request for that change order, Mr. Hahn stated " I'm not signing a fucking thing." (Id.). Mr. Hahn also stated "I'm here now, and we're going to build it exactly how it is that I want it." (Id.). In response to Mr. Hahn's statements, Mark Hoerstman replied "All right, Ron [Mr. Hahn], this is the way it's going to be. I'll build this for you just the way you want it, but when I'm done here, I'm going to lay the bills on the table, and you're going to pay them." (Id.). Mr. Hahn responded to Mark Hoerstman's statement regarding payment by stating that he did not give a fuck what it cost– get it done. (Id., Tr. Vol III, p. 60; B, 35b).

After this conversation and throughout the remainder of the construction project, Mr. Hahn orally ordered changes to the fixed fee contract on a daily basis. (Tr., Vol. I, p. 145; A, 109a). Because of the many changes ordered by Mr. Hahn, Hoerstman was no longer performing construction pursuant to the fixed fee contract. (Id.). Hoerstman was following the direction of Mr. Hahn solely in performing the work on the house. (Id.).

There were so many changes to the original fixed fee contract ordered by Mr. Hahn that an explanation of the changes occupies approximately ten pages in the trial transcript. (See Tr., Vol.

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I, pp. 147-157; B,13b-23b). The changes ordered by Mr. Hahn included but were not limited to: tearing out 800 square feet of concrete floor and replacing footings to accommodate pergo flooring (Tr., Vol. I, p. 147; A, 110a); a sliding glass door was installed and then removed and replaced with another door at Mr. Hahn's request (Id.); a light near this door was installed and then removed and replaced with another light at Mr. Hahn's request (Tr., Vol. I, pp. 147-148; A, 110a-111a); a window was removed from a bedroom and installed in the laundry room where no window existed before (Tr., Vol. I, p 148; A, 111a); an existing window that was left over from the house was installed in the garage where there was an existing window (Id.); the master bedroom was supposed to have a plant shelf but Mr. Hahn ordered Hoerstman to move the wall back ten feet higher into the cathedral ceiling (Id.); more drywall, insulation and pocket doors were added by Mr. Hahn (Id.); an extra vanity and a larger tub were ordered by Mr. Hahn for the bathroom which required Hoerstman to move the plumbing to accommodate the change (Id.); the bathroom door was installed and then removed and installed in the guest closet at Mr. Hahn's request (Id.); although the fixed fee contract never contemplated work in the guest bedroom, Hoerstman was ordered by Mr. Hahn to finish the guest closet and paint the shelves (Id.); a bifold door was installed in the bathroom and then removed and modified to a double-swing door at Mr. Hahn's request (Id.); drywall work to the walls in the two bedrooms was added after Mr. Hahn ordered the heating and electrical contractors to cut into the walls wherever they needed (Tr., Vol. I, p. 149; A, 112a); a closet was added to the center bedroom (Tr., Vol. I, p. 150; A, 113a); the thirty-nine hundred dollar ($3,900.00) kitchen in the fixed fee contract was upgraded to a ninety-five hundred dollar ($9,500.00) kitchen (Tr., Vol. I, p. 151; A, 114a); a freestanding sink in the laundry room was contemplated in the fixed fee contract but Mr. Hahn ordered Hoerstman to modify one of the existing kitchen cabinets to accommodate the laundry

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sink (Tr., Vol. I, p. 152; B, 18b); the furnace was moved from the utility room to the attic (Id.); outside of the house patios were enlarged, existing sidewalks were removed, new sidewalks were added; and the existing electrical service was buried (Tr., Vol. I, pp. 152-153; B, 18b-19b). Mrs. Hahn took no part in ordering the changes. (Tr., Vol. I, p. 146; B, 12b).

Fourth, in response to the Hahn Brief, paragraph 5, page 8, at the December meeting between the parties, Mr. Hahn stated that he was not going to pay another dime to Mark Hoerstman until Mrs. Hahn agreed to place Mr. Hahn's name on the deed to the house. (Tr., Vol. I, p. 165; B, 26b, Tr., Vol. III, p. 58; A, 139a). It was at this point in time that Hoerstman was forced to explain the costs of construction for the extras– ordered by Mr. Hahn– to Mrs. Hahn. (Tr., Vol. I, pp. 162-163; B, 24b-25b).

Fifth, in response to the Hahn Appellate brief, third full paragraph, page 9 and paragraphs one and two of page 10, Mark Hoerstman did in fact fax a letter asking for an additional $16,910.79 for a final lien waiver. (Tr., Vol. II, p.66; A, 142a). However, at that time, Mark Hoerstman was attempting to negotiate an amicable settlement with the Hahns. (Tr., Vol. II, p. 80; B,30b). The amount that was actually due from the Hahns to Hoerstman was $32,750.00. (Complaint, ¶ 17, p. 4; A, 23a). To settle the dispute, Mark Hoerstman offered to deduct from the amount owed by the Hahns the profit Hoerstman was entitled to receive for the entire job. (Tr., Vol. II, pp. 80-81; B, 30b-31b).

Despite Hoerstman's best efforts to settle by offering to deduct from the amount owed all of its profit on the job, the Hahns responded by sending Hoerstman a check for $5,144.79 with the words "final payment" written on it. Mark Hoerstman, concerned about this language on the check, consulted his then attorney, Murray Campbell, who lined out the final payment language on the

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check and told Mark Hoerstman to go ahead and cash the check. (Tr., Vol II, pp. 70-71; A, 146a-147a).

The testimony on direct examination of Mark Hoerstman pertaining to the $5,144.79 check tendered by the Hahns was as follows:

> Q: Where you consulting with an attorney at that time about getting paid?
>
> A: I had had a discussion about my lien rights with an attorney, yes. I had had discussions with him about how to go about collection of this money.
>
> Q: And did you meet with an attorney when you received the check [for $5,144.79 from the Hahns]?
>
> A: I did, and you know, I got a letter with this thing that said the Hahns considered this as payment in full, **but in the end of the letter it said there's still points that are open for negotiation, and if this is not satisfactory then we'll defer to arbitration, is what the letter said.** So, I took the letter and this check to an attorney that I had secured, and he read the letter, he looked at the check, and he told me that this might be legal in Indiana, but it's not legal in Michigan, and my attorney, Murray Campbell, lined out the payment designate on the check, and told me to go ahead and deposit it, that it's not a problem, that my acceptance of this check was not, not admitting or not saying that this is a payment in ful, because his advice to me was this is not legal in Michigan. So, I did at my counsel's advice deposit the check.

(Tr., Vol. I, p. 171; B, 27b) (Emphasis added).

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COUNTER-ARGUMENT

I. THE PARTIES DID NOT ENTER INTO AN ACCORD AND SATISFACTION WHEN HOERSTMAN GENERAL CONTRACTING, INC. CASHED A CHECK FROM THE HAHNS, AFTER CROSSING OUT THE "FINAL PAYMENT" LANGUAGE ON THE CHECK, SINCE THERE WAS NOT A GOOD FAITH DISPUTE, THE LANGUAGE USED BY THE HAHNS WAS NOT CLEAR, UNEQUIVOCAL AND UNAMBIGUOUS, AND THERE WAS NO MEETING OF THE MINDS.

A. STANDARD OF REVIEW

The Circuit Court Judge and Court of Appeals found in favor of Hoerstman and against the Hahns on the Hahns' accord and satisfaction defense. (Trial Court Judgment; A, 11a)(Court of Appeals Opinion; A, 15a-16a). A trial court's legal conclusions are reviewed de novo. Walters v. Snyder, 239 Mich.App. 453, 456, 608 N.W.2d 97, 99 (2000). Further, the appellate court "reviews the findings of fact by a trial court sitting without a jury under the clearly erroneous standard." MCR 2.613(C), Walters, 239 Mich.App. at 456, 608 N.W.2d at 98. "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." Walters, 239 Mich.App. at 456, 608 N.W.2d at 98-99.

B. THE ACCORD AND SATISFACTION DEFENSE

Accord and satisfaction is an affirmative defense with the burden of proof on the Defendant. Nationwide Mutual Insurance Co. v. Quality Builders, Inc., 192 Mich.App. 643, 646, 482 N.W.2d 474, 476 (1992). An accord and satisfaction is generally contractual in nature and is based on contract principles. Id. In Fuller v. Integrated Metal Technology, Inc., 154 Mich.App. 601, 607, 397 N.W.2d 846 (1986), the Court of Appeals stated "An 'accord' is an agreement between the parties

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to give and accept, in settlement of a claim or previous agreement, something other than that which is claimed to be due, and 'satisfaction' is the performance or execution of the new agreement."

However, the law of accord and satisfaction deviates from the general law of contracts on one principle:

> That particular principle relates to a situation where one party tenders an item in full satisfaction of a claim and the other party accepts the thing tendered. In such a situation, an accord and satisfaction may arise regardless of the lack of an agreement between the parties. An accord and satisfaction may be effected by payment of less than the amount which is claimed to be due if the payment is tendered by the debtor in full settlement and satisfaction of the claim. **In order to effect an accord and satisfaction under such circumstances, the tender must be accompanied by an explicit and clear condition indicating that, if the money is accepted, it is accepted in discharge of the whole claim.**

Fuller, 154 Mich.App. at 607-608, 397 N.W.2d 846 (1986)(Emphasis Added).

To prove that an accord and satisfaction exists, "the defendant must show (1) its good-faith dispute of (2) an unliquidated claim of the plaintiff, (3) its conditional tender of money in satisfaction of the claim, and (4) the plaintiff's acceptance of the tender (5) while fully informed of the condition. Nationwide, 192 Mich.App. at 647, 482 N.W.2d at 477 (1992).

In regard to element (5) above, "the law will deem a creditor to have been fully informed where the tender of money in full payment of a disputed claim is made in unequivocal terms." Id. In order for the statement to be deemed made in unequivocal terms, it "must be clear, full and explicit." Id. This Court should find that an accord and satisfaction cannot lie in this case because: (1) the Hahns did not have a good faith dispute of the amount due and owing to Hoerstman; (2) the Hahns did not fully inform Hoerstman in unequivocal terms that acceptance of the check for $5,144.79 would result in an accord and satisfaction and, thus, there was no meeting of the minds; and (3) Hoerstman was not fully informed of the condition and did not know that acceptance of the

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check would result in a release of any further claims that it had against the Hahns.

Such a finding would be consistent with the correct decision reached by the Court of Appeals. In its unpublished opinion, the Court of Appeals held that an accord and satisfaction was not reached. In support of its holding, the Court of Appeals stated as follows:

> This Court has repeatedly held that in order to effect an accord and satisfaction, the tender must be accompanied by an explicit and clear condition indicating that, if the payment is accepted, it is accepted in discharge of the whole claim. The words "final payment" written on a check was not sufficient to inform plaintiff that its acceptance of the check discharged the whole claim.

(Court of Appeals Opinion, pp. *3-4; A, 15a-16a) (internal quotations and citations omitted).

C. THERE IS NO ACCORD AND SATISFACTION SINCE THE HAHNS DID NOT DISPUTE THE AMOUNT CLAIMED DUE AND OWING BY HOERSTMAN IN GOOD FAITH.

During the construction project, Mr. C. Ronald Hahn agreed to pay the extra charge to have the concrete floor removed. (Tr. Vol. III, p. 17; A, 169a). Mark Hoerstman requested that Mr. Hahn sign a written change order for the work; in response Mr. Hahn stated " I'm not signing a fucking thing." (Tr. Vol. I, p. 144; B, 11b). Mr. Hahn also stated "I'm here now, and we're going to build it exactly how it is that I want it." (Id.). In response to Mr. Hahn's statements, Mark Hoerstman replied "All right, Ron [Mr. Hahn], this is the way it's going to be. I'll build this for you just the way you want it, but when I'm done here, I'm going to lay the bills on the table, and you're going to pay them." (Id.). Mr. Hahn responded to Mark Hoerstman's statement regarding payment by stating that he did not give a fuck what it cost– get it done. (Id., Tr. Vol III, p. 60; B, 35b).

After this conversation and throughout the remainder of the construction project, Mr. Hahn orally ordered changes to the fixed fee contract on a daily basis. (Tr., Vol. I, p. 145; A, 109a). Hoerstman was following the direction of Mr. Hahn solely in performing the work on the house.

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(Id.). As previously stated on pages 4 and 5, supra, there were so many changes to the original fixed fee contract ordered by Mr. Hahn that an explanation of the changes occupies approximately ten pages in the trial transcript. (See Tr., Vol. I, pp. 147-157; B,13b-23b). Mrs. Hahn took no part in ordering the changes. (Tr., Vol. I, p. 146; B, 12b).

At the December meeting between the parties, Mr. Hahn stated that he was not going to pay another dime to Mark Hoerstman until Mrs. Hahn agreed to place Mr. Hahn's name on the deed to the house. (Tr., Vol. I, p. 165; B, 26b, Tr., Vol. III, p. 58; A, 139a). It was at this point in time that Hoerstman was forced to explain the costs of construction for the extras– ordered by Mr. Hahn– to Mrs. Hahn. (Tr., Vol. I, pp. 162-163; B, 24b-25b).

The facts introduced at trial showed that the Hahns' dispute regarding the amount owed was motivated by a conflict between Mr. and Mrs. Hahn regarding ownership of the home– not the work performed by Hoerstman. (Tr., Vol. I, p. 165; B, 26b) (Tr. Vol. III, p. 58; B, 34b). Throughout the construction project, Mr. Hahn stated that he was in charge and things were going to be done his way. (Tr., Vol. I, p. 144; B, 11b). Further, he didn't care what it costs to do things his way and he refused to sign any written change orders. (Id.). Mr. Hahn changed his position to Hoerstman's detriment when his wife refused to title the property in both of their names. (Tr., Vol. I, p. 165; B, 26b) (Tr., Vol. III, p. 58; B, 34b) In short, Hoerstman was unwillingly caught in the middle of a lover's quarrel. Despite the fact that Mr. Hahn agreed to pay for all of the changes, when Mr. Hahn refused to pay for what he ordered until his name was placed upon the property, Mrs. Hahn disputed what was owed. The problem with her dispute was that she was not present or involved when Mr. Hahn made the changes.

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At the time of their dispute Hoerstman claimed that $32,750.00 was owed. (Complaint, ¶ 17, p. 4; A, 23a). Mrs. Hahn's dispute of this amount was not in good faith, but rather, was based upon her lack of knowledge as to the changes and additions that her husband husband verbally ordered Hoerstman to perform. And, since Mr. Hahn refused to sign any written change orders and agreed to pay Hoerstman's bill in full, there was no need to maintain records of all of the verbal changes and additions made by Mr. Hahn. Further, Mrs. Hahn cannot be heard to complain that her husband did not have authority to make the changes made, as she sat idly by at the time that the changes were made. Therefore, the Hahns cannot establish an accord and satisfaction defense as there was no good faith dispute of what the Hahns owed to Hoerstman.

D. THERE IS NO ACCORD AND SATISFACTION SINCE THE HAHNS DID NOT STATE IN CLEAR, UNEQUIVOCAL AND UNAMBIGUOUS TERMS THAT ACCEPTANCE OF THE CHECK IN THE AMOUNT OF $5,144.79 WOULD RESULT IN A RELEASE OF THE HAHNS FROM ANY FURTHER CLAIMS BY HOERSTMAN AND HOERSTMAN WAS NOT FULLY INFORMED OF THE CONDITION.

In Nationwide, 192 Mich.App. 643, 482 N.W.2d 474 (1992), the Court of Appeals addressed directly the requirement of clear and unequivocal terms. In that case, the defendant sent a check to plaintiff for $2,210 marked "Paid in Full" with an accompanying letter of accounting to show how defendant arrived at this figure. Nationwide, 192 Mich.App. at 644, 482 N.W.2d at 476 (1992). The letter contained the following language: "To whom it may concern: Enclosed you will find a check in the amount of $2,210. This pays my account with Nationwide [plaintiff] in full." Nationwide, 192 Mich.App. at 649, 482 N.W.2d at 477 (1992). Plaintiff deposited the check and later brought an action against defendant claiming that it was owed $31,379. Nationwide, 192 Mich.App. at 644, 482 N.W.2d at 476 (1992).

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The Court of Appeals held that the defendant's statements were not "so clear, unequivocal, and unambiguous that the fully informed plaintiff that its claim would be satisfied upon negotiating the check." Nationwide, 192 Mich.App. at 649, 482 N.W.2d at 477 (1992). "[T]he statement must be so clear, full and explicit that it is not susceptible of any other interpretation." Nationwide, 192 Mich.App. at 649, 482 N.W.2d at 478 (1992). The Court of Appeals held in Nationwide that the language used could easily be understood to mean that defendant believed that all he owed plaintiff was $2,210 with no accord and satisfaction implied. Nationwide, 192 Mich.App. at 650, 482 N.W.2d at 478 (1992).

To contrast the holding in Nationwide, in Faith Reformed Church of Traverse City v. Thompson, 248 Mich.App. 487, 639 N.W.2d 831 (2001), the Court of Appeals found the language at issue to be unequivocal. In that case, regarding a dispute over rent owed, defendants sent plaintiff a letter offering $2,819.65 as "full and final resolution of any and all rental claims which the landlord [plaintiff] has against the tenant [defendant]." Faith Reformed Church, 248 Mich.App. at 489, 639 N.W.2d at 833 (2001). Plaintiff cashed the check and then, one month later, plaintiff wrote a letter to inform defendant that acceptance of the check was not in full settlement of plaintiff's rental claims. Faith Reformed Church, 248 Mich.App. at 490, 639 N.W.2d at 833 (2001). The Court of Appeals held, in that case, the condition accompanying the tender of payment was expressed in a letter by defendant in clear and unequivocal terms. Faith Reformed Church, 248 Mich.App. at 493, 639 N.W.2d at 834 (2001).

In the present case, the Hahns wrote Hoerstman a letter before they sent Hoerstman a check for $5,144.79 with the language "final payment" written upon it. (Exhibits 45; A, 80a) (Exhibit 46; A, 90a). In the letter, the Hahns included an accounting of what they believed was owed to

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Hoerstman. (Exhibit 45; A, 80a). The language that the Hahns must rely upon to prove that they unequivocally expressed to Hoerstman that acceptance of the check would be an accord and satisfaction is as follows:

> **If we send you a check for the $5,144.79 we will consider this account closed and will not expect discussion of the other * items. We will then expect the lien waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney.** (Exhibit 45; A, 82a) (Emphasis Added).

Mark Hoerstman did not understand this language to be a release of all claims that Hoerstman had against the Hahns. However, he sought the advice of attorney Murray Campbell because he was concerned about effect of the words "final payment" on the check. (Tr., Vol II., pp. 70-71; A, 146a-147a). Attorney Campbell crossed out the words "final payment" on the check and told Mark Hoerstman to go ahead and deposit the funds into Hoerstman's account. (Tr., Vol. II, p. 71; A, 147a).

The language used in the letter and the writing of the words "final payment" on the check by the Hahns is similar to the language in the Nationwide case. As in Nationwide, the language used by the Hahns could easily be understood to mean the Hahns believed that all they owed plaintiff was $5,144.79 with no accord and satisfaction implied. See Nationwide, 192 Mich.App. at 650, 482 N.W.2d at 478 (1992). Hoerstman never intended acceptance of this check to be a release of its claims against the Hahns. (Tr., Vol. I, p. 171; B, 27b).

The language utilized by the Hahns in the instant case is easily subject to different interpretations. Upon payment of the $5,144.79, the Hahns **expected** no more discussion regarding the disputed items and **expected** Hoerstman to provide a lien waiver. (Exhibit 45; A, 82a). Further, if there was more discussion regarding the disputed items or Hoerstman refused to provide a lien

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waiver, the Hahns indicate that they would resort to arbitration per their attorney. (Exhibit 45; A, 82a) (Tr., Vol. I, p. 171; B, 27b). Although the language used indicates the Hahns' expectations, such precatory language is a far cry from indicating that acceptance of the enclosed check was a full and final settlement and release of any and all claims that Hoerstman had against the Hahns.

Further, contrary to the Hahns' assertion in their brief (page 19-20), the fact that Mark Hoerstman sought legal advice and his then attorney crossed out the words "final payment" that were written upon the check does not conclusively show that Hoerstman knew the effect of the language used; nor does it change the fact that the language used was unclear, equivocal and ambiguous. See Fritz v. Marantette, 404 Mich. 329, 332, 273 N.W.2d 425, 426 (1978) (the issue of whether the negotiation of a check, after the restrictive condition is stricken, acts as an accord and satisfaction depends upon the facts of the individual case).

In short, there simply was no meeting of the minds between Hoerstman and the Hahns that depositing the check would release Hahns from further liability for money it owed Hoerstman. Del Serrone Contracting Corp. v. Avon Twp., 77 Mich.App. 82, 83, 257 N.W.2d 667, 668 (1977)(an essential element of an accord and satisfaction is a 'meeting of the minds'). Therefore, the Hahns have failed to meet their burden of proof by failing to show that they fully informed Hoerstman in unequivocal terms that acceptance of the check would constitute an accord and satisfaction.

E. THE CASES CITED BY THE HAHNS IN THEIR BRIEF IN SUPPORT OF THEIR ACCORD AND SATISFACTION DEFENSE ARE FACTUALLY DISTINGUISHABLE FROM THE PRESENT CASE AND, THUS, THE HOLDINGS OF SUCH CASES DO NOT APPLY.

The Hahns' reliance upon the facts of Shaw v. United Motors Products Co., 239 Mich. 194, 214 N.W. 100 (1927) is misplaced and distinguishable from the instant case. In Shaw, the plaintiff

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provided the defendant with written demand for full payment of an outstanding account in the amount of $1,762.50. Shaw, 239 Mich. at 195, 214 N.W. at 101. In response, defendant sent a check in the amount of $412.50 with the following written correspondence: "The amount herein $412.50, is in full, in final payment of our account with you." Id. Further, when plaintiff, through its attorneys, indicated to defendant that the $412.50 was credited against the defendant's account but was not accepted in full satisfaction of plaintiff's claim, defendant, through his attorney, demanded for a return of the $412.50 paid if the condition of tender was not accepted. Id. Plaintiff, through its attorneys, refused to return the $412.50 and advised defendant that plaintiff would credit such amount against defendant's account. Thereafter, plaintiff sued to recover the outstanding balance. Id.

The Shaw case is distinguishable from the present case since, in Shaw, there was evidence that defendant's attorney requested that the funds be returned if the condition of tender was not accepted. The conditional language at issue in Shaw was not in and of itself clear and unequivocal and the language used was quite similar to the language utilized in Nationwide, page 12 supra. However, an accord and satisfaction was reached in the Shaw case since the plaintiff was fully advised of the conditional tender. Plaintiff was not fully advised by the language used by the defendant, but rather, was fully advised after the defendant's attorney sought tender back of the amount paid if the condition was not accepted.

As the Hahns never sought a tender back of the funds provided to Hoerstman, nor did the Hahns elaborate on their intentions behind the language accompanying the check in any other manner, this Court should find that Shaw is distinguished from the instant case and determine that the language used was not clear and unequivocal. This is necessarily the result as the Hahns did not

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attempt to inform Hoerstman of their intent other than through the ambiguous letter accompanying payment. Thus, there was no meeting of the minds as Hoerstman was not fully informed of the condition.

The Hahns' reliance on other case precedent in an attempt to support its accord and satisfaction defense is also misplaced and easily distinguished from the facts of the present case.

First, the Hahns erroneously rely upon DMI Design & Mfg. v. ADAC Plastics, Inc., 165 Mich.App. 205, 210, 418 N.W.2d 386, 388 (1987). In that case, defendant tendered a check accompanied by a note indicating that "acceptance of the payment would be taken as a release of any and all future claims against defendant." Id. at 208. Further, the back of the check had typed upon it the following release and settlement language:

> The endorsement of this check acknowledges full and final settlement of any and all claims of DMI Design and Manufacturing [plaintiff] against Adac Plastics, Inc. [defendant] arising out of the Purchase Agreement issued by DMI Design and Manufacturing to Adac Plastics, Inc. for the production of 2,000 window frame s [sic] and interior frame stick for ventilating door lite [sic]. The tender of payment of the amount on this check is not an admission of liability on the part of Adac Plastics, Inc., but is to compromise a disputed claim. Id. at 208.

In an attempt to render this above-quoted language nugatory, plaintiff typed the following sentence on the back of the check: "Endorsement of this check doesn't constitute acceptance of the above statement." Id. Plaintiff then negotiated the check.

The Michigan Court of Appeals determined that plaintiff knew the effect of the above quoted language as such language was unambiguous and all-encompassing as to any and all claims that plaintiff had. DMI Design & Mfg., 165 Mich.App. at 210; 418 N.W.2d at 388. Further, the court found that plaintiff knew exactly what it was doing when it negotiated the check as plaintiff had previously rejected and returned a tender of a lesser sum issued by defendant in full satisfaction of

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plaintiff's claims. Id. The court went on to hold that a plaintiff may not obviate the effect of the language used by defendant to create a clear, unequivocal and unambiguous expression of an accord and satisfaction by crossing out or obliterating the words used. Id. at 210-211.

Unlike the language used in DMI Design & Mfg., the language used in the present case is not clear, equivocal and unambiguous. The precatory and ambiguous language used by the Hahns falls well short of the clearly stated language used by the defendant in DMI Design & Mfg. Thus, the DMI Design & Mfg. case is distinguished from the facts of the instant case. Further, contrary to the Hahns' assertion, the mere obliteration of the words used does not conclusively establish that the language used was clear, unequivocal and unambiguous and understood by Hoerstman as barring any and all further claims for compensation. See Fritz v. Marantette, 404 Mich. 329, 332, 273 N.W.2d 425, 426 (1978) (the issue of whether the negotiation of a check, after the restrictive condition is stricken, acts as an accord and satisfaction depends upon the facts of the individual case). Further, recall that the Hahn's check was accompanied by an ambiguous letter which spoke of future arbitration of the dispute over what the Hahns owed to Hoerstman.

Second, the Hahns erroneously rely upon the case of Davis v Kramer Bros. Freight Lines, Inc., 373 Mich. 594, 130 N.W.2d 419 (1964) in an attempt to support their accord and satisfaction defense. In that case, this Court found an accord and satisfaction as a matter of law since plaintiff acquiesced to the deductions and charges withheld from his paycheck for a period of three years. Id. at 599. Thus, in Davis, it was through three years of continued acceptance of the amount paid that established the defense of accord and satisfaction. Id.

In the present case, it cannot be said that there has been a repeated or reoccurring practice of Hoerstman accepting less than he claimed was owed from the Hahns. In fact, there was only one

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isolated event and one isolated tender of funds in this case. Thus, in the instant case, it cannot be said that an accord and satisfaction has been established through acquiescence or through a repeated practice of any kind.

Third, the Hahns erroneously rely upon the case of Omscolite Corp. v. Federal Insurance Co., 374 Mich. 344, 132 N.W.2d 154 (1965). In that case, the defendant Federal Insurance Company tendered a draft in the sum of $365,000 "in full settlement of Fire Loss" that plaintiff suffered. Omscolite Corp., 374 Mich. at 346; 132 N.W.2d at 155 . Further, the following language appeared on the back of the draft issued by defendant and endorsed by plaintiff: "By endorsement hereof the payee acknowledges having received the amount of this draft in full settlement of claim as described on the face of this draft [for Fire Loss]." Id. The plaintiff also submitted a second proof of loss to another insurance company known as the Connecticut Fire Insurance Company. Connecticut also tendered a draft to plaintiff containing nearly identical language as follows: "Endorsement of this draft constitutes a complete release and settlement of the claim or account stated on the face hereof. hereof the payee acknowledges having received the amount of this draft in full settlement of claim as described on the face of this draft." Id. This Court held that the language used by the two defendant insurance companies constituted an accord and satisfaction. Omscolite Corp., 372 Mich. at 348; 132 N.W.2d at 156.

Fourth, the Hahns also erroneously rely upon Puffer v. State Mut. Rodded Fire Ins. Co., 259 Mich. 698; 244 N.W. 206 (1932) in an attempt to support their accord and satisfaction defense. In that case, plaintiff suffered a fire loss and sought reimbursement from his insurance policy. Puffer, 259 Mich. at 699; 244 N.W. at 206. The language utilized by the defendant insurance company on insurance check was as follows:

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> This draft in full payment of loss at Dwl. House & Cont. & Furn. Per. on 11-21-20. Insured under Policy No. 41263 and we hereby jointly and severally release State Mutual Rodded Fire Insurance Co. of Mich. from any and all claim therefor."

This Court held that an accord and satisfaction was established since the language used fully informed plaintiff of condition. Puffer, 259 Mich. at 702; 244 N.W. at 207.

Unlike the language used in Omscolite and Puffer as quoted above, the language used by Hahns falls well short of clearly, unequivocally and unambiguously indicating that acceptance of the check constitutes a full settlement and release of Hoerstman's claims against the Hahns. In fact, the language used by the Hahns is precatory and only indicates that they expected no more discussion about the disputed items and expected to receive a lien waiver. There is no language, however, in the accompanying letter drafted by the Hahns indicating that acceptance of the tendered check was in full satisfaction and a release of Hoerstman's claims. Thus, the language used by the Hahns is precatory, unclear, equivocal and ambiguous and falls well short of establishing or supporting an accord and satisfaction as found in the Omscolite and Puffer cases.

Fifth, the Hahns erroneously rely on the case of Eisenberg v. C.F. Battenfield Oil Co., 251 Mich. 654, 232 N.W. 386 (1930). In Eisenberg, the plaintiff sued the defendants in an attempt to recover a balance claimed due for the rental of an oil station pursuant to a written ten (10) year lease at $200 per month. Eisenberg, 251 Mich. at 654, 232 N.W. at 386. Based upon the fact that the lease proved unsatisfactory and not profitable, defendants entered into negotiations with plaintiff in an attempt to surrender the lease. Id. As a result of such negotiations, the undisputed facts showed that the parties verbally agreed to reduce the monthly rent obligation of defendant would be reduced from $200 to $150 and, thereafter, defendant paid plaintiff each month by check $150 with the words "payment in full" written on the check. Id. Plaintiff, in turn, erased the "payment in full" language

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from the check and cashed defendant's $150 check each month. Based upon plaintiff's specific verbal agreement to reduce the monthly rental obligation and repeated acceptance of the defendant's checks for such reduced amount, this Court determined that plaintiff could not recover the additional $50 per month requested and the rental reduction agreement was binding based upon the regular payment and acceptance of the reduced rental amount. Eisenberg, 251 Mich. at 657; 232 N.W. at 387.

The instant case is easily distinguished from the facts in Eisenberg. In the present case, the parties did not reach any verbal or written agreement regarding the amount due and payable by the Hahns to Hoerstman. Further, it cannot be said that the Hahns' letter accompanying its check indicate an agreement to reduce the amount that Hoerstman claimed owed. Again, the language that accompanied the Hahns tender of a check to Hoerstman does not indicate a meeting of the minds or a clear, unequivocal and unambiguous intent to effectuate a release of any and all additional claims that Hoerstman may have against the Hahns. The language utilized by the Hahns is as follows:

> **If we send you a check for the $5,144.79 we will consider this account closed and will not expect discussion of the other * items. We will then expect the lien waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney.** (Exhibit 45; A, 82a).

Unlike in Eisenberg where it was undisputed that a clear agreement to reduce the monthly rental obligation of defendant was reached, the precatory language used by the Hahns only indicates their expectations and does not clearly and unambiguously indicate that, if Hoerstman accepted the check, it would release any and all claims that it had against the Hahns for additional amounts claimed owed. In fact, the Hahns left Hoerstman's claim for additional funds open by indicating in their letter that if their "expectations" were not acceptable, the Hahns would attempt to resolve the

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matter through arbitration. (Exhibit 45; A, 82a) (Tr., Vol. I, p. 171; B, 27b).

Further, the Eisenberg case dealt with the issue of repeated performance preventing a verbal modification agreement (pertaining to a written lease for a period of greater than one year) from being barred by the statute of frauds and only indirectly with the doctrine of accord and satisfaction. As the present case deals directly with the issue of whether the there was a meeting of the minds and whether the Hahns' clearly, unequivocally and unambigously expressed their intent to enter into an accord and satisfaction, the Eisenberg case is inapplicable. This is necessarily the case as, in Eisenberg, it was undisputed that a clear, unequivocal and unambiguous verbal agreement to reduce the rent was reached by the parties.

Sixth, the Hahns erroneously rely upon the case of Lehaney v. New York Life Insurance Co., 307 Mich. 125, 11 N.W.2d 830 (1943). In that case, plaintiff sued defendant in an attempt to recover under the double indemnity provisions of a life insurance policy issued by defendant on plaintiff's late husband's life. Lehaney, 307 Mich. at 127; 11 N.W.2d at 830. The insurance policy provided that the defendant would pay double the face value of the insurance policy if the insured's death resulted "directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury." Id. Prior to the insured's death, he became ill and suffered from migraine headaches. Lehaney, 307 Mich. at 127; 11 N.W.2d at 831. Just prior to the insured's death, he slipped, fell and broke his arm. Id. However, the insured died from a blood clot that resulted in thrombosis and a pulmonary embolism. Id.

Plaintiff filed written proof of death with the insurance company and sought recovery pursuant to the double indemnity clause of the insurance policy. Lehaney, 307 Mich. at 128; 11

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N.W.2d at 831. In a written letter, the defendant insurance company clearly indicated that the double indemnity claim was being denied as the insured's death was caused in part by disease and not completely by bodily injury. Id. The writing further indicated that the defendant's liability for the insured's death was limited to single indemnity and the enclosed check was "for Single Indemnity in full settlement of all claims." Id. Further, the insurance checks provided to plaintiff bore on their face the following language "in full settlement of all claims under policy No. * * *." Id.

On cross-examination, plaintiff admitted that she knew that defendant refused to pay double indemnity. Lehaney, 307 Mich. at 130; 11 N.W.2d at 832. Further, this Court found that, in addition to plaintiff's knowledge that defendant would not pay pursuant to the double indemnity terms of the policy, the language accompanying and included on the checks cashed by plaintiff unambiguously expressed the condition of acceptance and resulted in an accord and satisfaction. Lehaney, 307 Mich. at 130-31; 11 N.W.2d at 832.

Contrary to the facts in Lehaney, the written language accompanying the Hahns' tender is precatory, ambiguous, unclear and equivocal. And, unlike the unequivocal denial of plaintiff's double indemnity claim in Lehaney, the Hahns left Hoerstman's claim for additional funds open by indicating in their letter that if their "expectations" are not acceptable, the Hahns would attempt to resolve the matter through arbitration. (Exhibit 45; A, 82a). Further, since Hoerstman was unclear by the meaning of the Hahns' ambiguous, equivocal and unclear condition (if it can even be considered a condition), he hired an attorney to review the language used. (Tr., Vol. I, p. 171; B, 27b). That attorney advised Mr. Hoerstman that, based upon Michigan law, he could cash the check without compromising any additional claims that he may have against the Hahns' for additional moneys owed. (Tr. Vol. II, page 76; B, 29b). Thus, based upon the ambiguous language used by

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the Hahns', it cannot be said that Hoerstman knew and was fully informed that acceptance of the check would result in an accord and satisfaction.

Finally, the Hahns erroneously rely upon the case of Lafferty v. Cole, 339 Mich. 223, 63 N.W.2d 432 (1954). In that case, plaintiff claimed $2,400 was due for services that he rendered for defendant. Lafferty, 339 Mich. at 225; 63 N.W.2d at 433. As the parties had not set a fixed price for plaintiff's services, a dispute arose and defendant tendered a check in the amount of $500 to plaintiff and told plaintiff "I will give you this $500 on what you claim, and give you no more. I will pay you no more." Lafferty, 339 Mich. at 227; 63 N.W.2d at 434. This Court held that plaintiff's acceptance and negotiation of the check constituted an accord and satisfaction since the condition accompanying tender was clear and unambiguous and plaintiff was fully informed of such condition. Lafferty, 339 Mich. at 227-28; 63 N.W.2d at 434.

In the instant case, the condition accompanying the Hahns' tender was not of the "take it or leave it" variety and is unclear, equivocal and ambiguous. The Hahns' did not advise Hoerstman, nor was Hoerstman informed, that if he cashed the check it was in full satisfaction and a release of any further claims that he may have. (Tr., Vol. I, p. 171; B, 27b). The condition accompanying the Hahns' tender merely relays its expectations and further indicated that if the amount offered was not acceptable, the parties could resort to arbitration. As such, the facts and holding of Lafferty are easily distinguished from this case and wholly inapplicable.

Therefore, this Court should determine that there is no accord and satisfaction since the Hahns did not state in clear, unequivocal and unambiguous terms that acceptance of the check in the amount of $5,144.79 would result in a release of the Hahns from any further claims by Hoerstman and Hoerstman was not fully informed of the condition. Further, this Court should determine that

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the cases cited by the Hahn's in their brief are factually distinguished from and not applicable to the instant case.

II. AN ACCORD AND SATISFACTION CANNOT LIE IN THIS CASE SINCE THE HAHNS DID NOT DISPUTE THAT THEY OWED HOERSTMAN THE $5,144.79 WHEN THEY PAID HOERSTMAN BY A CHECK WITH THE WORDS "FINAL PAYMENT" WRITTEN UPON IT.

In Gitre v. Kessler Products Co, et. al., 387 Mich. 619, 622; 198 N.W.2d 405, 407 (1972), the defendant attempted to prove the affirmative defense of accord and satisfaction due to restrictive language found on the reverse side of the check accepted by plaintiff. The check stub accompanying the final check to plaintiff showed that the amount paid was for commissions that defendant did not dispute were owed. Gitre, 387 Mich. at 623; 198 N.W.2d at 407 (1972). The Supreme Court held that the defendant merely paid what both parties acknowledge was due on the specific debt or claim and that "payment of an existing, undisputed claim does not, without more, work an accord and satisfaction as to all claims." Gitre, 387 Mich. at 624; 198 N.W.2d at 408 (1972). Thus, payment of the liquidated (undisputed) portion of money owed does not work an accord and satisfaction.

Similarly, in Del Serrone, 77 Mich.App. at 83; 257 N.W.2d 667 (1977), plaintiff sued to recover money allegedly owed to it by plaintiff for the construction of a water main. The defendant attempted to establish an accord and satisfaction by proof of a check that bore the language "FINAL PAYMENT TIENKEN ROAD WATER MAIN EXTENSION." Del Serrone, 77 Mich.App. at 83, 257 N.W.2d at 668 (1977). This Court held "an accord and satisfaction is the substitution of performance agreed upon by the parties to a *disputed* claim. The mere payment of an *undisputed* claim does not establish an accord and satisfaction as to other disputed claims." Id.

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In Del Serrone, the Court of Appeals focused on the important requirement that there be a meeting of the minds before a binding accord and satisfaction can be reached, as follows:

> An essential requisite of an accord and satisfaction is a "meeting of the minds". The "meeting of the minds" requirement for an accord and satisfaction is not shown as a matter of law by plaintiff's negotiation of defendant's check bearing the above-related restrictions ["FINAL PAYMENT TIENKEN ROAD WATER MAIN EXTENSION"]....

Del Serrone, 77 Mich.App. at 83-84; 257 N.W.2d at 668.

In the present case, the Hahns' payment of $5,144.79 to Hoerstman only related to that portion due and owing by the Hahns to Hoerstman that was not disputed by the parties. (Tr., Vol. II, p. 112; B, 32b). In the letter sent by the Hahns to Hoerstman, the Hahns stated that their accounting was their best effort to sort through the invoices that Hoerstman gave them to support what Hoerstman claimed was due and owing by the Hahns. (Exhibit 45, p.1; A, 80a). At that time, Hoerstman claimed that the Hahns owed $16,910.79[4]. (Tr., Vol. II, p. 66; A, 142a). The Hahns disputed that they owed Hoerstman $16,910.79 and agreed to pay Hoerstman the portion they did not dispute. (Exhibit 45; A, 80a). The portion not disputed by the Hahns was $5,144.79. And here, as in Del Serrone, there was no meeting of the minds. Both cases involve "final payment" restrictive endorsements and in both cases there was no "meeting of the minds."

As in Gitre and Del Serrone, the Hahns failed to prove that there was an accord and satisfaction because payment of an existing, undisputed claim does not, without more, work an

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4 At that point in time, Mark Hoerstman was attempting to negotiate an amicable settlement with the Hahns. (Tr., Vol. II, p. 80; B, 30b). The amount that was actually due from the Hahns to Hoerstman was $32,750.00. (Complaint, ¶ 17, p. 4; A, 23a). To settle the dispute, Mark Hoerstman offered to deduct from the amount owed by the Hahns the profit Hoerstman was to receive for the entire job. (Tr., Vol. II, pp. 80-81; B, 30b-31b). The resulting figure was $16,910.79.

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accord and satisfaction as to all claims. In short, the Hahns cannot prove that the payment of $5,144.79 was unliquidated. Since the Hahns did not pay Hoerstman more than they already agreed was due and owing to Hoerstman, there is no new consideration (ie, no substitute performance) to support the Hahns claim of an accord and satisfaction. See Puett v Walker, 332 Mich. 117, 122; 50 N.W.2d 740, 743 (1952) (an accord and satisfaction, because it is a contract, must be supported by a good or valuable consideration and the performance of what one is already legally obligated to do is not consideration for a new promise).

Therefore, this Court should find that the Hahns failed to prove an accord and satisfaction because their payment of $5,144.79 to Hoerstman was merely a performance of what they were already legally obligated to pay. Without a good or valuable consideration to support the Hahns claim of accord and satisfaction, their claim must fail. It cannot be said that the Circuit Court Judge's denial of the Hahns accord and satisfaction claim was clearly erroneous. The evidence presented at trial supported the trial court's decision and the affirmation thereof by the Court of Appeals.

CONCLUSION

The Hahns failed to establish the defense of accord and satisfaction since the Hahns' dispute was a result of a dispute between husband and wife over title to the property upon which the construction occurred and not the work performed by Hoerstman in accordance with the verbal orders of Mr. Hahn. Bad faith is further evident by the fact that Mr. Hahn told Mark Hoerstman that he did not care what his verbal changes cost and he agreed to pay Hoerstman's bill in full when presented. Further, the Hahns failed to establish the defense of accord and satisfaction because the language accompanying its tender of the check was not clear, unequivocal and unambiguous and

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Hoerstman was not fully informed that acceptance of the check would release any and all further claims he may have against the Hahns. Finally, the Hahns also failed to establish the defense of accord and satisfaction since they only paid Hoerstman what the parties already agreed was due and owing and, thus, the payment made was not toward a disputed claim.

RELIEF REQUESTED

Hoerstman requests that this Court sustain the judgment of the Circuit Court Judge, as affirmed by the Court of Appeals, awarding Hoerstman a money judgment and rejecting the Hahns' accord and satisfaction defense, and award any further relief that this Court deems fair and just, including costs and Hoerstman's reasonable attorney fees.

Respectfully submitted,

Dated July 21 2005

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